TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 706.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JAMES O. CURTIS AND JOSHUA T. FOSTER.

AND

No. 707.

JAMES O. CURTIS AND JOSHUA T. FOSTER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 8, 1879.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between the United States of America, plaintiffs, and James O. Curtis and Joshua T. Foster, both of Medford, in our said district, surviving defendants, in an action of contract, a manifest error hath happened to the great damage of the said United States of America as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the United States.

2 Circuit court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith under the seal of the said circuit court a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this eleventh day of October, A. D. 1878.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 The United States of America to James O. Curtis and Joshua T. Foster, both of Medford, in our district of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for said district of Massachusetts, wherein the United States of America are plaintiffs in

error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

OCT. 8, 1878.

I acknowledge service of the within.

T. H. TALBOT,
Att'y for Curtis & Foster.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between the United States of America, plaintiff, and James O. Curtis and Joshua T. Foster, both of Medford in our said district, surviving defendants, in an action of contract, a manifest error hath happened to the great damage of the said Curtis and Foster, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October current, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the United States.

5 Circuit court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith under the seal of the said circuit court a true and attested copy of the record and proceedings in the suit

within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this eleventh day of October, A. D. 1878.

[SEAL.] JOHN G. STETSON, *Clerk.*

6 The United States of America to the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October current pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein James O. Curtis and Joshua T. Foster, both of Medford in said district, surviving defendants, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

Due service of the above citation is hereby acknowledged.

GEORGE P. SANGER,
U. S. Att'y.

7 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six, before the honorable Nathan Clifford, associate justice.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
v.
JAMES O. CURTIS, JOSHUA T. FOSTER, AND PETER C. Hall, all of Medford, in our district of Massachusetts, defendants.

In an action of contract.

8 And the plaintiffs say the defendants jointly with one Oliver Holman, since deceased, executed to them a bond, a copy whereof is hereto annexed. And the plaintiffs say that the said Holman, at the time of the execution of said bond, and thereafter continuously up to and until the thirtieth day of November, A. D. eighteen hundred and sixty-five, was additional paymaster in the Army of the United States as in said bond stated, and that the said Holman, during said period, while paymaster as aforesaid, and as such paymaster, did receive into his hands a large sum of public moneys, the property of the United States, to wit, the sum of three thousand three hundred and twenty dollars and two cents, and that the said Holman did not, as required

by the condition of said bond, refund said public moneys to the United States, when thereunto lawfully required, the same then remaining in his hands unaccounted for, and the defendants owe the United States the said sum of three thousand three hundred and twenty dollars and two cents, with interest thereon from said thirtieth day of November, A. D. eighteen hundred and sixty-five, to the damage of the said United States, as they say, the sum of twenty-one thousand dollars.

The following is the copy of bond referred to the foregoing declaration, namely:

Know all persons by these presents, that we, Oliver Holman, of Medford, county of Middlessex and commonwealth of Massachusetts, and James O. Curtis, Joshua T. Foster, and Peter C. Hall, all of Medford, and county, and State aforesaid, are holden, and stand firmly bound and obliged unto the United States of North America, or their certain attorney, in the penal sum of twenty thousand dollars, current money of the said United States, well and truly to be paid into their Treasury, for which payment faithfully to be made and done we, the said Oliver Holman, James O. Curtis, Joshua T. Foster and Peter C. Hall, do bind ourselves and each of us, our heirs, executors and administrators, and each and every of them, for and in the whole, jointly, severally and firmly by these presents, signed with our hands and sealed with our seals, this thirtieth day of May, in the year one thousand eight hundred and sixty-two.

The condition, however, of this obligation is such, that whereas the above-bounden Oliver Holman is appointed an additional paymaster in the Army of the United States aforesaid:

Now, if the said Oliver Holman shall well and truly execute and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, executors or administrators, shall regularly account, when thereunto required, for all moneys received by him from time to time as paymaster aforesaid with such person or persons as shall be duly authorized and qualified on the part of the said United States for that purpose, and also refund, at any time when thereunto required, any public moneys remaining in his hands unaccounted for, then this obligation shall be null, void and of no effect; otherwise to remain and be in full force and virtue.

Done at Medford, in the State of Massachusetts, on the day and year before written.

OLIVER HOLMAN. [SEAL.]
JAMES O. CURTIS.
J. T. FOSTER.
PETER C. HALL.

Signed, sealed, and delivered in the presence of—
B. F. HAYES, to J. T. Foster.
R'D BURGESS, to O. Holman.

I, Oliver Holman, do solemnly swear that I will diligently and faithfully execute and perform the duties of paymaster in the Army of the United States of North America, according to the best skill and abilities of which I am possessed. So help me God.

OLIVER HOLMAN.

12 Sworn and subscribed to, at the city of Washington, D. C., this second day of June, 1862, before me, a justice of the peace within and for the county of Washington, in the District of Columbia, by Major Oliver Holman.

R'D BURGESS.

The writ in this cause was dated the fifteenth day of October, A. D. 1872, whereupon the marshal of our district made his return in the words following, namely:

U. S. OF AMERICA,
Mass. Dist., ss:

BOSTON AND MEDFORD, *April* 1, 1873.

Pursuant hereunto, I have this day attached a chip as the property of the within-named defendants, and afterwards on the same day I left at the last & usual place of abode of said within-named Joshua T. Foster and James O. Curtis a summons of the writ for their appearance at court as within directed. I also made diligent search for the with-
13 in-named Peter C. Hall, but have not found him within my district.

ROLAND G. USHER,
U. S. Marshal.

Fees: Service 4; travel 36—4.36.

This cause was entered in this court at the May term thereof, A. D. 1873, when and where the parties appeared by their respective attorneys, and thence the cause was continued from term to term to this present term, when the plaintiffs appear by their attorney, but the defendants, although solemnly called to come into court, do not appear, but severally make default.

And thereafter the defendants do appear by their attorney and claim a hearing in the assessment of damages.

On the thirteenth day of June, A. D. 1876, the following agreed statement of facts is filed, namely:

Agreed statement of facts.

This was an action of contract against the defendants as sureties upon the official bond of Oliver Holman, additional paymaster in
14 the Army of the United States; date of the bond May 30, 1862, penal sum twenty thousand dollars. The writ is dated October 15, 1872. The bond is a joint and several bond, and its conditions were "that whereas the above bounden Oliver Holman is appointed an additional paymaster in the Army of the United States: Now, if the said Oliver Holman shall well and truly execute and faithfully discharge according to law and to instructions received by him from proper authority his duties as paymaster aforesaid, and he, his heirs, executors or administrators shall regularly account when thereunto required for all moneys received by him from time to time as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the said United States for that purpose, and also refund at any time when thereunto required any public moneys remain-
15 ing in his hands unaccounted for."

The breach of the bond set forth in the declaration is (after stating that he had received a large sum of public moneys into his hands, to wit, the sum of $3,320.02) "that the said Holman did not as required

by the condition of said bond refund said public moneys to the United States when thereto lawfully required, the sum then remaining in his hands unaccounted for, and the defendants owe the United States the said sum of $3,320.02 with interest thereon from November 30, 1865." (The pleadings may be referred to.)

Holman went out of office on the last-named day, Nov'r 30, 1865, and on that day rendered a final account showing nothing due to the United States or himself. One credit in that account was for "$26,528.00 stat*e*n as per report to Paymaster General, August 7, 1865."

On March 18, 1872, on final adjustment of this account the sum
16 of thirty-three hundred and twenty dollars and two cents (3,320.02) was found by the Second Auditor to be due to the United States. April 17, 1872, a letter enclosing the accompanying "statement of differences" which showed this result was by this officer forwarded to Holman's address without reaching him, he having deceased the preceding February. Coming into the hands of his son, Herbert A. Holman, the latter asked for a reconsideration of the adjustment by a letter addressed to the Secretary of War. This officer declined to change his decision as no new facts were presented; and this refusal was communicated to Herbert A. Holman by the Second Auditor in a letter of May 31, 1872, which concludes as follows:

"In view of this action the legal representatives of Major Holman are requested to transmit to this office a draft upon New York payable to the order of the Second Auditor in settlement of the balance due
17 the United States ($3,320.02), a reasonable time for which will be allowed. A failure to comply with which request will necessitate legal proceedings for its recovery."

No payment of said balance or any part thereof has been made. No suit has been brought against Holman or his representatives separately or with these defendants. No notice of Holman's failure to refund the above sum appears to have been given to the sureties (these defendants), except by the service of this writ. The sureties entered an appearance in court in this suit by their counsel, and obtained a continuance from term to term that they might present their claim for relief to the Court of Claims.

Such claim was presented in the Court of Claims, but that court since the last continuance of this case, finding that the money was stolen by an orderly to whom Holman had entrusted it to be carried to a
18 bank for deposit but that Holman was without fault or neglect in so entrusting it to the orderly, rejected the claim, and thereupon at the present term the defendants consented to a default.

The attorney of the United States in making up the amount for which execution should issue claims that in addition to the principal debt ($3,320.02), about which there is no dispute, interest upon the principal debt at the rate of six per cent. per annum is to be allowed from Nov. 30, 1865; and to this claim for interest the defendants by their counsel object.

There is no evidence of any demand upon the legal representatives of Major Holman beyond what is stated in these facts.

THE UNITED STATES OF AMERICA,
By GEORGE P. SANGER,
U. S. Att'y.

THOS. H. TALBOT,
For Defendants.

19 *Statement of remaining differences upon a revision of settlement of Maj. Oliver Holman, A. P. M., from Sept., 1861, to November 30th, 1865.*

		Balance due United States as per official statement		3,320 02
		" " his acc't current		
		Difference		3,320 02
		Accounted for as follows:		
		Settlement No. 3443:		
Vou.	124	Co. G, 22nd Mass. Vol's. Over to abstract		30
		Settlement No. 512:		
"	730	Co. D, 22nd Mass. Vol's. Overadded		214 93
		Credits:		
"	775	Co. E, 13th N. Y. Vol's. Short added	100 00	
"	825	Co. C, 6th N. Y. Cavl. Short added	100 00	
		The following am't on books of office and not on acc't current of Maj. Holman.		
1864.				
Dec'r	7	To Maj. Wm. Richardson, A. P. M., Dec. 30, '62		500 00
			200 00	715 23
20		Amount brought forward	200 00	715 23
		Settlement No. 738:		
Vou.	55	Co. F, 2nd Maine Vol's. Overadded		4 00
		Credits:		
		Am't charged himself on acc't current, having stopped a like sum from Lt. A. P. Case in favour of Maj. E. J. Porter on vou. 484, ⅔ 2638, and entered the vou. net on his abs't.	10 50	
		Settlement No. 179:		
"	544	Co. E, 36th Mass. Vol's. Overadded		100 00
		Settlement No. 2090:		
"	116	J. C. Haymer, Lt. 62d Mass. Vol's. Over to abstract		360 00
		Credits:		
"	66	W. S. Porter's Co. 62d Mass. Vol's. Short added	266 71	
"	344	11th Mass. Light Batt. 1st page of roll short added	40 00	
			517 21	1,179 23
				517 21
				662 02
21		Am't brought forward		662 02
		Add am't on ⅔ current for Nov., 1865, reported as stolen, disallowed on reference to Secret'y of War		2,658 00
				3,320 02

TREASURY DEPARTMENT,
SECOND AUDITOR'S OFFICE, *March*, 1872.

F. O. ELANGTRE.

TREASURY DEPARTMENT,
2ND COMPTROLLER'S OFFICE, *April 4th*, 1872.

J. Q. ADAMS.

22 This cause is thereupon set down for hearing and fully heard by the court, and the court being of the opinion that the defendants having had no notice of the default of the principal upon his bond, interest on sum admitted to be due should be calculated from the date of the writ and not from November 13, 1865, the date of Holman's retiring from office, and the forfeiture of the bond declared on appearing by the default of defendants; and it being made to appear to the court that there is due, according to equity, the sum of four thousand one hundred nine dollars and sixty-three cents, it is considered by the court, to wit, October 2, 1876, that the said United States of America, plaintiffs, recover of the said James O. Curtis, Joshua T. Foster,
23 and Peter C. Hall, defendants, the sum of four thousand one hundred nine dollars and sixty-three cents damage, being the sum due according to equity, and their costs of suit taxed at twenty-seven dollars and seventy-six cents.

A true record.
Attest:

JOHN G. STETSON,
Clerk.

The following is the opinion of the court in accordance with which the judgment of the court in said cause was entered October 2, 1876.

24 *Opinion of the court.—Sept* 2, 1876.

CLIFFORD, J.:

Holman, as appears by the agreed statement, was an additional paymaster in the Army, and it also appears that the defendants are sureties in his official bond, that the official bond was dated May 30, 1862, and that it was executed by principal and sureties in the penal sum of twenty thousand dollars.

By the terms it also appears that it was a joint and several bond, and that the conditions of the same were that whereas the above bounden Oliver Holman is appointed an additional paymaster in the Army of the United States: Now, if he "shall well and truly execute and faithfully discharge according to law and to instructions received by
25 him from proper authority his duties as paymaster as aforesaid, and he, his heirs, executors, or administrators shall regularly account, when thereunto required, for all moneys received by him from time to time as paymaster as aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and also refund at any time when thereunto required any public moneys remaining in his hands".

Public funds being in the hands of the principal, and the payment into the Treasury being refused, the United States instituted the present action of debt against the sureties of the principal in his official bond. Service was made and the defendants appeared and pleaded the general issue. Enough appears to show that the principal in the bond went out of office on the thirtieth day of November, A. D. 1865,
26 and that he rendered a final account on that day, showing nothing due to the United States, but it did show that he had charged to the United States the sum of two thousand six hundred and fifty-eight dollars, for money stolen from his custody. Subsequently, to wit, on March 8, 1872, the accounting officers settled his account, and having rejected that charge, found that he owed three thousand three hundred and twenty dollars and two cents to the United States.

Application was made by his son for a settlement of the account, but the Secretary of War refused the application, as no new facts were presented. Continuances were obtained by the defendants from term to term in order that they might apply for relief to the Court of Claims. Such a claim was presented to the Court of Claims, but it appears that the application was rejected. It appears that the principal was
27 guilty of neglect, and thereupon the defendants consented to a default. Both parties agree that the principal due is three thousand three hundred and twenty dollars and two cents, but the United States claim interest upon that sum from the thirtieth of November, 1865, which claim of interest is resisted by the defendants, they insisting that they are liable for interest only from the date of the writ. When the request of the son to open the account was refused the Auditor requested him to pay the balance found to be due in the settlement within a reasonable time, and stated that a failure to do so would necessitate legal proceedings for its recovery.

Payment was never made, and no prior suit was commenced, and no notice was ever given to the sureties of the delinquencies of the principal. Reported cases almost without number decide without qual-
28 ification that the responsibility of a surety rests upon the valid-

ity and terms of his contract, and that his liability for the debt or default of another cannot be extended by implication beyond the fair meaning of the terms of his agreement. He is bound to this extent in the manner and under the circumstances pointed out in his stipulation and no farther. (Smith v. U. S., 2 Wall., 234.)

Sureties have a right to stand upon the very terms of their contract, and if a variation is made without their consent it is fatal to the right of recovery. When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled that the case against the surety or guarantor must be brought strictly within the terms of the instrument, and the rule is universal that the liability of such a party cannot be extended by mere implication. (McCluskey v. Cromwell, 1 Kern., 29 598; U. S. v. Boeckler, 21 Wall., 657; Leggett v. Humphreys, 21 How., 76; U. S. v. Boyd, 15 Pet., 208; Birckhead v. Brown, 5 Hill, 640; Kellogg v. Stockton, 29 Penn. St., 463.)

Coming to the words of the bond, they are that the principal shall "refund at any time when required any public moneys remaining in his hands unaccounted for." Moneys belonging to the public were certainly in his hands, but the record fails to show that he was ever required to refund the same within the true intent and meaning of those terms during the continuance of the principal in his office. All that appears upon the subject is the letter of the Auditor to the son of the principal, in which the Auditor reports the principal of the debt as the sum due, not including anything for interest, and requests the son to send a draft for that amount, adding that a reasonable time will be allowed for 30 compliance, and that a failure to comply will necessitate legal proceedings for the recovery.

Six months later the present suit was instituted, but no notice was ever given to the sureties that the principal obligor in the bond was in any default, nor were the sureties ever requested to make good his default prior to the commencement of this suit. They never stipulated to refund public moneys in his hand when his term of office expired or at his decease. Instead of that, their covenant was that he should refund when thereto required, and the only requirement found in the agreed statement of facts is the commencement of the suit now in litigation. Many cases decide that sureties are not liable beyond the penalty of the bond in which their obligation is contained, but the court of appeals held, in the case of Brainard v. Jones (18 N. Y., 35), that that rule was inapplicable to a question of interest accruing after the sureties 31 themselves were in default for not paying according to the condition of the bond. Commenting upon that principle, the supreme court of Massachusetts say that interest in such a case may be added to the penalty or damages for the detention for such time as the case shows the surety to have been in fault for the non-payment. But the court held that the undertaking of the surety in that case by its express terms was not that of a joint promissor with the principal, and that he could not be said to have been in fault until notice that he had become liable and demand of payment had been made (Bank v. Smith, 12 Allen, 253). Interest was allowed to the marshal in U. S. v. Cogswell (3 Sum., 208), on items of his account which had been improperly rejected in the adjustment of his account by the accounting officers of the Treasury, and on the authority of that case the court held in U. S. v. Smith 32 that the marshal was entitled to interest in a like case, but the court also held that if interest was allowed to the defendant on the principle that he had been illegally kept out of money since the

charge was rejected, the same principle renders it proper to allow interest to the United States since the demand of the balance due them, and of which they have since been illegally deprived by the defendants. (U. S. v. Smith et al., 1 W. & M., 195.) Neither party was allowed interest in the case of McGill v. Bank of U. S. (12 Wheat., 515) before the date of the writ, and it was refused to the plaintiff in that case upon the precise ground laid down in the preceding case.

Sufficient appears in these cases to show that it has not been the practice to allow interest in cases where there has been no demand or notice before the date of the writ. Suppose that is so, still it is insisted by the United States that the question is controlled by section 3624
33 of the Revised Statutes. (Rev. Stats., p. 719.) By that section it is enacted that "whenever any person accountable for public moneys neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment is obtained thereon, and an interest of six per centum per annum from the time of receiving the money until it was paid in the Treasury.

Liability for interest arises, where the provision applies, from the time of receiving the money, but it cannot apply in this case for the
34 reason that the accounts of the delinquent principal were not then settled, and of course no balance had been reported against him for which the sureties were responsible. There was no delinquency, either of principal or surety, as neither one nor the other had been requested to refund. Both parties agree that the final account of the principal showed nothing due from him to the United States, nor did the Treasury account show him to be delinquent until the settlement of his account by the Auditor.

Tested by these considerations, it is clear that the section in question does not apply in a case like the one before the court. Support to that view is also found in the fact that no decided case is referred to where any such rule is laid down in respect to a surety in an official bond, and it is believed that no such case can be found in which any reference to that section as being applicable to such a case is made.

35 Properly compared with the conditions of the bond, it is clear that the section is inapplicable to sureties. Beyond question it was enacted to reach the principal, and it may be an effectual remedy in cases where the First Comptroller pursues the steps therein pointed out.

Nothing of the kind appears in this case, and the court is of the opinion that the United States, in contemplation of law, is only entitled to interest from the date of the writ.

36 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the 15th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, before the honorable Nathan Clifford, associate justice.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
v.
JAMES O. CURTIS, JOSHUA T. FOSTER, AND PETER C. HALL, all of Medford, in our district of Massachusetts, defendants.

In an action of contract.

37 Judgment having been entered in the above-entitled cause at the May term of this court, A. D. 1876, to wit, October 2, 1876, in favor of the said United States of America, plaintiffs, and against the said James O. Curtis, Joshua T. Foster, and Peter C. Hall, defendants, for the sum of four thousand one hundred and nine dollars and sixty-three cents damages, being the sum due according to equity, and for costs of suit, taxed at twenty-seven dollars and seventy-six cents, upon which judgment writs of error were sued out by each party, plaintiffs and defendants, to remove the said cause to the Supreme Court of the United States.

Now, at this May term, A. D. 1878, of this circuit court, on the third day of June, 1878, the mandate of the Supreme Court of the United States in said cause is received and filed, and on the eleventh
38 day of said June it is ordered by the court that the said mandate be recorded, and the same is recorded in the words and figures following:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting: [SEAL.]

Whereas lately, in the circuit court of the United States for the district of Massachusetts, before you or some of you, in a cause between the United States of America, plaintiff, and James O. Curtis, Joshua T. Foster, and Peter C. Hall, defendants, wherein the judgment of the said circuit court entered in said cause is in the following words, viz:

"It is considered by the court, to wit, October 2nd, 1876, that the said United States of America, plaintiffs, recover of the said James O.
39 Curtis, Joshua T. Foster, and Peter C. Hall, defendants, the sum of four thousand one hundred nine dollars and sixty-three cents damage, being the sum due according to equity, and their costs of suit, taxed at twenty-seven dollars and seventy-six cents," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and on the stipulation of counsel on file, and motion of Mr. Solicitor-General Phillips, it is now here ordered & adjudged by
40 this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be and the same is hereby remanded to the said circuit court for such further proceedings as justice and law may require, without prejudice to the right of either party.

13th May, 1878.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the thirty-first day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Costs of clerk, $; attorney, $; taxed by—

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

41 On the said eleventh day of June the attorney of the United States for this district suggests the death of the defendant Peter C. Hall, before judgment, and files the following motion for judgment:

Motion for judgment.

And now comes the said United States, after the default of the defendants, and in accordance with section 961 of the Revised Statutes of the said United States move and pray said court that judgment now be entered upon said default against defendants James O. Curtis and Joshua T. Foster, for the amount due the plaintiffs according to equity, by way of damages for breach of the bond whereon said suit is brought; the said Curtis and the said Foster being the only obligors thereon now living or upon whom service was made.

42 And the plaintiffs further say that said bond was given by one Holman as principal, and the above named defendants together with one Hall as sureties, to secure the due and faithful discharge by the said Holman of his duties as additional paymaster in the Army of the said United States; that said bond was joint and several, and that said Holman, on the 30th of November, 1865, went out of office and was then indebted to the plaintiffs in the sum of $3,320.02, the same being public money theretofore received by said Holman as such officer, which was not then and never since has been paid nor accounted for.

And the plaintiffs further say that no demand was made upon the sureties above named for the payment of said sum to the plaintiff prior to the 15th October, 1872, which was the date of the writ in said

43 case, but that they, the said plaintiffs, were greatly damnified by the aforesaid breach of said bond, and are now entitled to have and recover of the last named defendants as due according to equity, the said sum of $3,320.02 with interest thereon from said 30th November, 1865, and all costs of said suit.

Wherefore the plaintiffs move and pray, in accordance with the statute aforesaid, that judgment now be entered as aforesaid for said principal sum, together with said interest and costs.

By their attorney—

GEORGE P. SANGER,
U. S. Attorney.

And now, to wit, June 11, 1878, upon consideration thereof, it is considered by the court that the said United States of America, plaintiffs, recover of the said James O. Curtis and Joshua

44 T. Foster, surviving defendants, the sum of three thousand three hundred and twenty dollars and two cents, with interest thereon at the rate of six per centum per annum from the fifteenth day of October, A. D. 1872, the date of the writ in this cause, damages due accord-

ing to equity, and their costs of suit taxed at thirty-two dollars and ten cents; and it is ordered by the court that it be entered of record that the said surviving defendants object to the order for judgment and to the order for interest.

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

45 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of the United States of America v. James O. Curtis et al., in said circuit court determined, and of the opinion of court in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] JOHN G. STETSON, *Clerk.*

46 Supreme Court of the United States, Oct. term, 1878.

U. S., PLAINTIFFS IN ERROR,
vs.
J. O. CURTIS & AL. } Nos. 1064 & 1065.

J. O. CURTIS & AL., PLAINTIFFS IN ERROR,
vs.
THE U. S.

It is agreed that the stipulation filed in this court at the last term, upon which the judgment rendered in the above case in the circuit court was reversed, may be made part of the record in this case, one in fact.

EDWIN B. SMITH,
Ass't Att'y Gen'l for the U. S.
THOMAS H. TALBOT,
Counsel for Curtis & al.

(Indorsed:) Sup. Court U. S., 1878. Octo. term. Nos. 1064 & 1065. The United States, pl'ffs in error, vs. James O. Curtis & al., and James O. Curtis & al., p. e., vs. The U. States. Stipulation of counsel as to addition to record. Filed 14 January, 1879.

47 Supreme Court of the United States, Oct. t., 1877. Error to the circuit court for Massachusetts.

U. S., PLAINTIFFS IN ERROR,
vs.
JAMES O. CURTIS & AL.

JAMES O. CURTIS & AL., PLAINTIFFS IN ERROR,
vs.
THE U. S.

It is agreed that the defendant Hall, against whom a judgment was

in this case rendered with the other defendants, had died before the making of the original writ, and that for this cause the judgment shall be reversed and the case remanded to the circuit court for such further proceedings as justice & law may require, without prejudice to the rights of either party.

(Signed) THOS. H. TALBOT,
Att'y for Jas. O. Curtis & Al.
EDWIN B. SMITH,
Ass't Att'y General,
by direction of the Attorney General.

Filed 13 May, 1878.

(Indorsement on cover:) No. 706. The United States, plaintiffs in error, vs. James O. Curtis & Joshua T. Foster, and No. 707. James O. Curtis & Joshua T. Foster. plaintiffs in error, vs. The United States. Cross-writ. Massachusetts C. C. U. S. Filed 8th January, 1879.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE UNITED STATES
v.
CURTIS & FOSTER. } No 706.

CURTIS & FOSTER
v.
THE UNITED STATES. } No. 707.

ERROR TO UNITED STATES CIRCUIT COURT IN MASSACHUSETTS.

BRIEF OF UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE UNITED STATES
v.
CURTIS & FOSTER. } No. 706.

CURTIS & FOSTER
v.
THE UNITED STATES. } No. 707.

ERROR TO UNITED STATES CIRCUIT COURT IN MASSACHUSETTS.

BRIEF OF UNITED STATES.

STATEMENT.

The facts were agreed upon and submitted to the court below, as follows:

"This was an action of contract against the defendants as sureties upon the official bond of Oliver Holman, additional paymaster in the Army of the United States; date of the bond, May 30, 1862; penal sum twenty thousand dollars. The writ is dated October 15, 1872. The bond is a joint and several bond, and its conditions

were 'that whereas the above-bounden Oliver Holman is appointed an additional paymaster in the Army of the United States: now if the said Oliver Holman shall well and truly execute and faithfully discharge, according to law and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, executors or administrators, shall regularly account, when thereunto required, for all moneys received by him from time to time as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the said United States for that purpose, and also refund at any time when thereunto required any public moneys remaining in his hands unaccounted for this bond shall be void."

The breach of the bond set forth in the declaration is (after stating that he had received a large sum of public moneys into his hands, to wit, the sum of $3,320.02) "that the said Holman did not, as required by the condition of said bond, refund said public moneys to the United States when thereto lawfully required, the sum then remaining in his hands unaccounted for, and the defendants owe the United States the said sum of $3,320.02, with interest thereon from November 30, 1865."

Holman went out of office on the last-named day, November 30, 1865, and on that day rendered a final account, showing nothing due to the United States or himself. One credit in that account was for "$2,658 stolen, as per report to Paymaster-General, August 7, 1865."

On March 18, 1872, on final adjustment of this account, the sum of thirty-three hundred and twenty dollars and two cents was found by the Second Auditor to be due to the United States. April 17, 1872, a letter enclosing the

accompanying statement of "differences" which showed this result was by this officer forwarded to Holman's address without reaching him, he having deceased the preceding February. Coming into the hands of his son, Herbert A. Holman, the latter asked for a reconsideration of the adjustment by a letter addressed to the Secretary of War. This officer declined to change his decision as no new facts were presented; and this refusal was communicated to Herbert A. Holman by the Second Auditor in a letter of May 31, 1872, which concludes as follows:

"In view of this action the legal representatives of Major Holman are requested to transmit to this office a draft upon New York payable to the order of the Second Auditor in settlement of the balance due the United States ($3,320.02), a reasonable time for which will be allowed; a failure to comply with which request will necessitate legal proceedings for its recovery."

No payment of said balance or any part thereof has been made. No suit has been brought against Holman or his representatives separately or with these defendants. No notice of Holman's failure to refund the above sum appears to have been given to the sureties (these defendants) except by the service of this writ.

The sureties entered an appearance in court in this suit by their counsel, and obtained a continuance from term to term that they might present their claim for relief to the Court of Claims.

Such claim was presented in the Court of Claims, but that court, since the last continuance of this case, finding that the money was stolen by an orderly to whom Holman had entrusted it to be carried to a bank for deposit, but that Holman was *not* without fault or neglect in so entrusting it to the orderly, rejected the claim, and

thereupon, at the present term, the defendants consented to a default.

The attorney of the United States, in making up the amount for which execution should issue, claims that, in addition to the principal debt ($3,320.02), about which there is no dispute, interest upon the principal debt, at the rate of 6 per cent. per annum, is to be allowed from November 30, 1865; and to this claim for interest the defendants, by their counsel, object.

"There is no evidence of any demand upon the legal representatives of Major Holman beyond what is stated in these facts." (Record, 5, 6.)

The cause was thereupon fully heard, "and the court being of the opinion that the defendants having had no notice of the default of the principal upon his bond, interest on sum admitted to be due should be calculated from the date of the writ, and not from November 13, 1865, the date of Holman's retiring from office, and the forfeiture of the bond declared on appearing by the default of defendants; and it being made to appear to the court that there is due, according to equity, the sum of four thousand one hundred nine dollars and sixty-three cents, it is considered by the court, to wit, October 2, 1876, that the said United States of America, plaintiffs, recover of the said James O. Curtis, Joshua T. Foster, and Peter C. Hall, defendants, the sum of four thousand one hundred nine dollars and sixty-three cents damage, being the sum due according to equity, and their costs of suit taxed at twenty-seven dollars and seventy-six cents." (Record, 7, bottom.)

Peter C. Hall, one of the sureties, though named in the writ, was not served with process (Record, 5, folio 13); and it was ascertained that he had died before the suit was commenced; therefore it was stipulated at the Oc-

tober term, 1877, of this court, that the judgment previously rendered (upon default) which ran against Hall with his co-sureties should, "for this cause," be reversed, "and the case remanded to the circuit court for such further proceedings as justice and law may require, without prejudice to the rights of either party." (Record, 14, top.)

At the May term, 1878, of the circuit court, and on the 3d day of June, 1878, the mandate of this court was received, which recited that, on the transcript of record, and stipulation on file, the judgment was reversed and the cause remanded "for such further proceedings as justice and law may require, without prejudice to the right of either party." (Record, 11.)

On the 11th of June, 1878, the United States attorney, in Boston, moved for judgment on default against Curtis & Foster, "being the only obligors now living, or upon whom service was made," for the amount equitably due by way of damages, for breach of the bond whereon suit is brought. The motion recites "that said bond was given by one Holman as principal, and the above-named defendants together with one Hall as sureties, to secure the due and faithful discharge by the said Holman of his duties as additional paymaster in the Army of the said United States; that said bond was joint and several, and that said Holman, on the 30th of November, 1865, went out of office and was then indebted to the plaintiffs in the sum of $3,320.02, the same being public money theretofore received by said Holman as such officer, which was not then and never since has been paid nor accounted for.

"And the plaintiffs say that no demand was made upon the sureties above named for the payment of said sum to the plaintiff prior to the 15th October, 1872,

which was the date of the writ in said case, but that they, the said plaintiffs, were greatly damnified by the aforesaid breach of said bond, and are now entitled to have and recover of the last-named defendants, as due according to equity, the said sum of $3,320.02, with interest thereon from said 30th November, 1865, and all costs of said suit.

"Wherefore the plaintiffs move and pray, in accordance with the statute aforesaid, that judgment now be entered as aforesaid for said principal sum, together with said interest and costs.

"And now, to wit, June 11, 1878, upon consideration thereof, it is considered by the court that the said United States of America, plaintiffs, recover of the said James O. Curtis and Joshua T. Foster, surviving defendants, the sum of three thousand three hundred and twenty dollars and two cents, with interest thereon at the rate of 6 per centum per annum from the 15th day of October, A. D. 1872, the date of the writ in this cause, damages due according to equity, and their costs of suit taxed at thirty-two dollars and ten cents; and it is ordered by the court that it be entered of record that the said surviving defendants object to the order for judgment and to the order for interest." (Record, 12, 13.)

ASSIGNMENT OF ERROR.

1. The United States assign for error that in and by the said judgment, interest on the principal sum due and owing to the United States from said Holman was computed only from the date of the writ, October 15, 1872, whereas it should have been computed from the last day of November, 1865, when he went out of office.

2. That the court erred in fixing the amount of interest and the date from which it should accrue.

BRIEF.

I.

The agreement into which these defendants entered with the United States was, not only that Paymaster Holman should regularly account for all moneys received by him, but that he faithfully discharge his duties, "and also refund at any time *when thereunto required* any public moneys remaining in his hands."

The fundamental error into which we conceive the court to have fallen is as to the necessity for a demand of payment by some Treasury official, and as to the meaning of the words "when thereunto required."

"Required" was taken as synonymous with "requested." We do not so understand its purport in the connection in which it is here used.

The true inquiry is, when was Oliver Holman required by law, in the faithful discharge of his duty, to pay over to the United States the funds in his hands?

It should have been done November 30, 1865, when he went out of office.

So long as he continued to be paymaster, his possession of the funds was that of the United States; but this ceased to be so the instant he ceased to be paymaster; and the money was ever thereafterwards held adversely to the United States, contrary to the requirements of law and to the condition of his bond.

As a private citizen he was not authorized to keep possession of public funds for a moment. He knew it. He knew the law; was bound to know it; so were his

sureties. This knowledge was equivalent to a demand. He and they knew, and were bound to know, that he had no right to credit himself with money stolen. Such had always been the law, by uniform and authoritative decisions. (United States *v.* Prescott, 3 Howard, 578; Muzzy *v.* Shattuck, 1 Denio, 233; State *v.* Harper, 6 Ohio St., 607; State *a.* Township, 28 Ind., 86; Hancock *v.* Hayward, 12 Cush., 112; Com. *v.* Comly, 3 Penn. St., 374; and especially Halbert *v.* State, 22 Ind., 125.)

No Treasury officer had the right to allow any such credit. (Farmington *v.* Stanley, 60 Maine, 472; Porter *v.* Stanley, 47 Maine, 515; Angel *v.* Pownal, 3 Vt., 461; Horn *v.* Whittier, 6 N. H., 94; Carlton *v.* Bath, 2 Foster (22 N. H.), 559.)

In the first-cited case the selectmen, misled by an erroneous footing, certified the treasurer's account to be correct. He then had property but subsequently died insolvent. Suit being instituted upon his bond, the sureties defended upon the ground of their reliance upon the certificate, the error not being known until after the treasurer's insolvency. The court said, after referring to the statutory provision for a quarterly rendition and examination of accounts: "This has not been done. The sureties, however, are not thereby released. They covenanted that their principal should faithfully discharge the duties of his office. They are not released because other officers failed to do their duty. However negligent the selectmen might have been, the obligation was none the less stringent upon the treasurer that he should do his duty, irrespective of the negligence of other town officers" (60 Maine, 475), where the court then proceed to consider the effect of the certificate, given under the false impression created by the treas-

urer's error of computation, and conclude it had no effect. "Here was a mistake of the treasurer in addition. It was not perceived by the selectmen. * * * The selectmen had no right to discharge the treasurer nor his sureties from these liabilities under their bond in case of a breach. If they could not do this directly, without authority from the town, still less could they do it indirectly. *It was the neglect of the treasurer, in his addition of the amount received, that his defalcation was not then perceived.*" (60 Maine, 476, top.) *The court therefore awarded interest against the sureties from March* 4, 1864, *the day the erroneous account was rendered.* (*Ib.*)

In the Vermont case above cited, the court say: "When a receipt for money is executed by any town officer, it is evidence of payment to him, and nothing more. One who would receive such a receipt without actual payment should expect it would be treated as a *fraud* upon the town." (3 Vt., 462.)

The law authorizing the Court of Claims to allow credit for funds lost without fault of the custodian had not been passed when Mr. Holman retired from office. It was approved May 9, 1866.

So the insertion of such an item of credit in his own favor by Paymaster Holman, in his account rendered to the government's accounting officers, was not even notice of an intention to make application to the Court of Claims for its allowance.

He never did apply. Upon the application of the sureties to that court it was there held that the loss was one for which he was justly responsible, because of an ill, or unfaithful, discharge of duty. It had not been performed "according to law." Thus he is shown to have been in fault and default from the moment the loss

occurred. It was judicially established that he had not even an equitable claim to have this item allowed him. It emphasizes the impropriety of his insertion of it in his account. It shows that his doing so was a *fraud* upon the government. With that item out, there would have been an open, apparent, confessed balance against him, and his bond would have been immediately put in suit, if it were not paid promptly.

The same is true of the other items which make up the balance of $3,320.02 due upon a correct statement of the account, such a statement as it was his duty to make "according to law." Neither he nor his sureties should be allowed to derive any advantage from his own mistakes, and from his improper insertion of illegal claims. In these particulars the case of Farmington *v.* Stanley, 60 Maine, 475–6, is again referred to as a proper precedent.

II.

At the bottom of page 714 of the last edition of the Revised Statutes is found this provision of law:

"SEC. 3624. Whenever any person accountable for public money, neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury."

This is a reproduction of the act of March 3, 1797, c. xx, § 1.—1 Stats., 512.

From the opinion (Record, 10, folio 33) it would seem that the foregoing section was somewhat relied upon, or at least cited, by the district attorney in the circuit court. Whether it is applicable or not we now propose to submit to the court without discussion, simply observing that we confine our argument to the right to interest from the day the money should have been *refunded* by Major Holman, and not from the date of its *reception* by him. The right thus claimed is sustained upon general principles, and is not dependent upon special statutory provisions, which, if applicable, may be cumulative, but do not abolish those general principles.

In response to the suggestion that the operation of this section is confined to receiving officers, attention is called to the last line, which fixes the payment of interest until the money shall be "*re*-paid into the Treasury."

III.

We will submit with our views upon the subject of the liability to interest, a summary of the cases, showing our right to claim it from November 30, 1865.

We do not intend at all to controvert, question, or qualify the proposition (Record, 9, top) that the liability of a surety depends entirely upon "the fair meaning of the terms of his agreement," which cannot be varied without his consent. (*Ib.*)

The inquiry immediately recurs, however, what is the fair meaning of the terms of this particular contract into which these parties entered with the United States? Whatever the legal effect of that contract was originally,

such it remains now, without alteration by any subsequent direct act or implication.

The contract was (1) that Major Holman should well and *truly* execute, and *faithfully* discharge, "*according to law*," &c., the duties of the office to which he was appointed; (2) that he would regularly account; (3) "and also refund at any time when thereunto required any public moneys remaining in his hands unaccounted for." (Record, 5, bottom.) The sureties undertook that these things should be done.

As previously remarked, he was liable for the $2,658 lost. This responsibility would have existed had he been guilty of no negligence; but the finding of the Court of Claims (11 C. of Cl. Rep., 642, 647) shows that the loss occurred through his culpable carelessness. This adjudication did not create any liability, nor determine the facts, except for the action of that court. The truth was that he was liable from the date of the loss for conduct which did not well and truly execute, nor faithfully discharge, the duties of his office.

The agreement for an account required *correct* accounts. It was a breach of this covenant, and an ill and untrue execution of his duty, to present incorrect accounts; and it is a similar but more glaringly unfaithful discharge of his duty for him, among erroneous items, to insert one for the sum stolen, which "according to law" he knew could not be allowed him by the accounting-officers, and was an improper item of credit, making his account apparently balance, when in fact there was a debit to the United States. This was also a breach of the contract to refund when thereunto required according to law.

For these violations of their contract with the government, the sureties were justly and legally responsible

from the time they occurred. Those things were done which they guaranteed should not be done, and those things were omitted which they agreed should be well and truly and faithfully done according to law.

In these particulars, the contract of the sureties with the government is not severable or distinguishable from that of the principal. They each and all contract for precisely the same thing, in the same terms and sentence. The liability of each and all for the failure to observe these terms of their joint and several contract is identical.

It is hardly worth while to support so obvious a proposition by authority; still, we will quote half a dozen lines from the opinion of the Vermont court in Seaver *v.* Young, 16 Vt., 662: "But there is no distinction, in this respect, between the principal and the sureties. Alanson Seaver had engaged to do certain things; and for not doing them, he was liable. The sureties engaged that he should do them; and for his not doing them, *they* became liable. So that the same act, or neglect, that charges the principal, must charge the sureties. And the question returns to its starting place, and that is the liability of the said Alanson." (16 Vt., 662.) See, also, United States *v.* Cushman, 2 Sumner, 436, per Story, J.; Berg *v.* Radcliff, 6 Johns Ch., 302, per Kent, Ch.; Shaw *v.* McFarlane, 1 Ired., Law, 216, per Ruffin, C. J.; Hobbs *v.* Middleton, 1 J. J. Marsh., 176, per Robertson, J.

IV.

Recurring then, in the present case, to the liability of Oliver Holman, as the starting point, let us inquire what that was with reference to this single matter of interest.

As already observed, he had officially received from the United States Treasury certain funds to be disbursed to our soldiers. Whatever sum, if any, of that so received remained undisbursed at the expiration of his term he was required by law to return into the Treasury. He could not lawfully retain it as a private citizen. If not so disbursed or returned according to law, it remained in his hands "unaccounted for." It was not legally, or within the terms of the bond, accounted for by reporting it as lost—through his negligence, or otherwise—or as expended for any other than a governmental purpose. Nor was it accounted for by misstatements in an erroneous account. He cannot profit by his own errors or wrongdoing. Suppose, on retiring from office, with $3,320.02 due and owing to the government, instead of rendering an erroneous account, Major Holman had refused to render any at all; would not interest begin to run immediately upon the funds withheld? And can he relieve himself from that liability by stating an incorrect, untrue, and unfaithful account? Suppose he had then been asked to account, and had declined to do so; would not his sureties be liable for interest, without any special notice of such request and refusal? Can it enure to his or their benefit that he presented a false account, not according to law, nor such as a faithful discharge of duty required? The act of 1846, c. 90, § 16, requires all officers and persons charged with the safe-keeping, transfer, and disbursement of public money, "to keep an *accurate* entry of each sum received, and of each payment or transfer." (9 Stats., 63.)

If interest is allowable at all, in a case like the present, it accrues by reason of some *default* upon the part of

the obligor, and therefore begins to run from the day of such default. Failure to pay at the day when payment should be made is such a default as will cause interest to accrue therefrom without any demand (Dodge *v.* Perkins, 9 Pick., 368; Wood *v.* Robbins, 11 Mass., 506; Gay *v.* Gardiner, 54 Maine, 477; Buzzell *v.* Snell, 25, N. H. (5 Foster), 474; Nat'l. Lancers *v.* Lovering, 30 N. H. (10 Foster), 511; Whiteworth *v.* Hart, 22 Ala., 343, per Chilton, C. J., citing earlier Ala. cases; Williams *v.* Sherman, 7 Wend., 109, 112; Still *v.* Hunt, 20 Wend., 51, per Cowen, J.; Van Rensselaer *v.* Jewett, 2 N. Y. (Comst.), 139, 140, per Bronson, J.; Adams *v.* Fort Plain Bank, 36 N. Y., 261, per Davies, C. J.; Stacy *v.* Graham, 14 N. Y., 492; Lynch *v.* De Viar, 3 Johns., 303, 310; Clark *v.* Barlow, 4 Johns., 183; Honore *v.* Murray, 3 Dana (Ky.), 31; Elkin, *v.* Moore, 6 B. Monroe (Ky.), 462; Sims *v.* Gondelock, 7 Richardson (So. Co.), 23; Kennedy *v.* Barnwell, 7 Richardson (So. Co.), 124; Barr *v.* Hazelton, 10 Richardson (So. Car.), Eq., 61, 62; Palmer *v.* North, 35 Barb., 282, 294; Vt. & Can. R. R. Co. *v.* Vt. Cent. R. R. Co. *et als.*, 34 Vt., 1, 65, middle; Stevenson *v.* Maxwell, 2 Sandf. Ch., 273; Bassett *v.* Sanborn, 9 Cush. (Mass.), 68, middle; Cooper *v.* Rainey, 4 Minn., 532, lower half; Leake *v.* Lawrence, 11 Paige, 80; Evans *v.* State, 36 Texas, 323, which was suit upon an official bond).

Money retained against the owner's will, or without his consent, bears interest. (Rapalie *v.* Emory, 1 Dallas, 349; Greenly *v.* Hopkins, 10 Wend., 96.)

Even if retained by mistake. (Shipman *v.* Miller, 2 Root, 405, second case.)

People *v.* Gasherie, 9 Johns., 72, is a case in which a loan officer was charged with interest upon public funds retained by him.

Where the principal is to be paid at a specific time, (*Id certum*, &c.) the law has always implied an agreement to make good the loss arising from a default by the payment of interest. Per Colden, Senator, in Rensselaer Glass Co. *v.* Reid, 5 Cowen, 611, citing Lord Mansfield, in Robinson *v.* Bland, 2 Burrows, 1086, and adding: "This proceeds entirely on the idea of a *default*, and it is a universal maxim that where interest does not run with the principal it does not accrue until a default has been made in payment." (5 Cow., 611.) Upon a subsequent page (615) the same Senator, after citing numerous cases, remarks, "All these cases allow interest where there has been fraud, injustice, or *delinquency*, and none of them put the allowance of it on the ground of gain or benefit to the debtor from the use of the money alone. Upon the next page (616) he says, "Thus sheriffs and other public officers are required to pay interest on moneys received by them, which it was their duty to pay over immediately." (5 Cow., 616, citing cases.)

Where a bond named no day of payment, it was held to be payable at its date, and interest from date was computed, although there was no promise to pay interest expressed in it. (Farquhar *v.* Morris, 7 T. R., 124, cited, and followed in an action upon a similar instrument in Purdy *v.* Phillips, 11 N. Y. (1 Kernan), 406, and cases cited, per Denio, J.; Francis *v.* Castleman, 4 Bibb., 282.) This ruling rests upon the ground that the obligor was in default from the date of the bond.

In Swett *v.* Hooper, 62 Maine, 55, bottom, that court say that in People *v.* New York, 5 Cowen, 331, the principle was correctly and tersely stated, "*that whenever*

the debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay."

A true and faithful discharge of duty—applying the law, of which he could not be ignorant—would have enabled Major Holman to subtract from the amount of the funds placed in his charge the aggregate of the sums actually disbursed by him for the government; and he would have known that it was his duty to turn over the resulting balance into the Treasury on or before the day he retired from office. Otherwise, if he had any right to await a demand by some superior or accounting officer, it would follow that a total neglect or willful omission on the part of the Treasury officers would have relieved him from any obligation to restore to the Treasury the public funds, and would allow him to retain them perpetually for private use. On the contrary, it has been too often held, by this and other courts, to require citation, that the laches or wrong-doing of one agent cannot excuse the misconduct or omission of duty of another agent of the same principal—especially if both be public officers—nor the sureties of such agent or officer. (Hart *v.* United States, 95 U. S., 316, citing earlier decisions of this court; Farmington *v.* Stanley, 60 Maine, 472–476, cited *supra;* Supervisors *v.* Otis, 62 N. Y., 88.)

No demand is necessary. Stacy *v.* Graham, 14 N. Y., 497, cited infra.

Copious extracts are found below from the opinion in Anderson *v.* Georgia, 2 Kelly, 370, *et seq.*, as correctly stating the law.

"There is no question about the liability of executors, administrators, guardians, and other trustees, to pay interest upon trust funds in their hands, even before the *cestui que trust* is legally entitled to demand them; much

more, therefore, shall such funds bear interest when improperly withheld from those entitled to receive them." The same doctrine applies to agents. "Thus (says Story), if an agent improperly withholds the money of his principal, he is made liable for the ordinary interest of the country where it ought to be paid." (Story on Agency, 215; Short *v.* Skipwith, 1 Brock., C. C., 103, 104; 2 Kent, 630, note.)

"He was the agent of the Central Bank. His duty was to pay to that bank all moneys collected by him as such, within a reasonable time; the money in this case was *improperly withheld*. If it was his duty to pay it over at once, and he shows no excuse or reason why it was not, the inference of the law is, that the money was improperly withheld."

* * * * * *

"I do not propose to traverse the whole field of British and American law upon the subject of interest. Such a task is not made necessary by the case before us. I shall content myself with demonstrating, if possible, that where one *wrongfully detains* the money of another, *particularly where such an one is in character of agent, he is liable for interest from the time he received it.* Assuming as true, as I think we are authorized to do from the record, that the plaintiff in error held in his hands money *which was by law, and, we may add, by the terms of his contract and the exigencies of his bond, payable* to the Central Bank, and that he *detained it wrongfully, interest* is allowed as damages to the plaintiff for the detention of his debt, '*ratione detentionis debits.*' This is the primary idea of interest. (2 *Salk.*, 623; *Mr. Jefferson's letter to Mr. Hammond*, 1 *Am. State Pap.*, 213.)

"If the reason for allowing interest in all cases is found

in the detention of the debt, the allowance of interest is claimed by as clear and sound reason as if there had been a written undertaking to pay interest after maturity of a note. The money of a principal is due from his agent so soon after its collection as convenient opportunity occurs for its payment; in all cases, according to the books, after a demand, it bears interest. In this case no demand is necessary to put the agent in default, because to *the principal* he *admits the money is in hand*; from the moment of that admission the money is due, and if detained, the *detention creates the reason of the interest*." (The italics are thus found in the report.)

* * * * * *

After citing many English cases, the opinion proceeds:

"In the midst of this conflict of opinion in England, we turn to the American decisions, confident that our way will be lit with a clearer light. In our own country we think it is conclusively settled that where a defendant has *fraudulently acquired* or *wrongfully detained* the plaintiff's money, he is chargeable with interest from the time of his acquiring it. No matter what the state of the facts is, if the acquisition is fraudulent or the detention wrongful, he is liable for interest. It is scarcely necessary to say that any detention is wrongful which is in violation of a contract, as in the case now being decided, or which is in violation of another's legal right to have, demand, and receive the money. (Dodge *v.* Perkins, 9 Pick., 368; Weeks *v.* Hasty, 13 Mass. R., 218; Wood *v.* Robins, 11 Mass. R., 504; the Commonwealth *v.* Crevar, 3 Binn., 121; Gillet *v.* Maynard, 5 John. R., 88; The People *v.* Gasherrie, 9 John. R., 71; Greenly *v.* Hopkins, 10 Wend., 96; Crawford *v.* Willing, 4 Dall., 289; Slingerland *v.* Swart, 13 John. R., 256;

Brown *v.* Campbell, 1 S. & R., 179"); which cases are then severally reviewed.

* * * * * *

"Some of the cases which determine that a defendant holding money of another in his hands is liable for interest, go upon the principle that he has converted it to his own use. It might be said that in this case there is no evidence that Anderson used this money to his own profit. If *conversion of the fund* be necessary to render one liable for interest (which it is not my purpose to admit), then my reply is that *the retention of the money is presumptive proof that he kept it for his own profit, and he should therefore pay interest*, and it is so decided in South Carolina. (Simpson *v.* Feltz, 1 McCord Ch. R., 220.)

"Under these views, founded, as we hope has been shown, upon authority, we believe the defendant is liable for interest." (Anderson *v.* Georgia, 2 Kelly, 273–4, 376, 377, and 379.)

In Dodge *v.* Perkins (9 Pick., 368), above referred to, there is a summary of previous cases. The first headnote is, "where an agent, having received money, unreasonably neglects to inform his employer of it, he is liable for interest from the time when he ought to have given information." (Youmans *v.* Heartt, 34 Mich., 401.) Surely no advantage can accrue to the agent from giving *mis*information. "The great inquiry," says Putnam, J., delivering the opinion in that case, "is *whether the party has done* ALL *that the law required of him in that particular case.* * * * If he has, he is not accountable for interest; if he has not, he is accountable for it, *as a compensation for the non-performance of his contract.*" (9 Pick., 386, citing Woods *v.* Robinson, 11 Mass., 506 (where it is said, in last sentence upon that page, that

if the defendant has "wrongfully detained" the money, he must be charged with interest), and Fowler *v.* Shearer, 7 Mass., 14.)

The liability for interest does not arise against a debtor "until he is in fault for not paying the principal." (Gay *v.* Gardiner, 54 Maine, 479.)

"The old common-law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified by general consent, so far as to hold that if the amount is *capable* of being ascertained by mere computation, then it shall carry interest." (Selden, J., in McMahon *v.* N. Y. & E. R. R. Co., 20 N. Y., 469.) At the foot of the same page he observes, "There is, however, another ground upon which interest is sometimes allowed, and perhaps with propriety may be, although the amount of the demand neither has been nor can be readily ascertained [which is not the fact in this case], viz: that the debtor is *in default* for not having taken the requisite steps to ascertain the amount of his debt." (*Ib.*) If he could readily have ascertained, and did not, his fault is greater.

"The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the

creditor is obliged to resort to the courts for redress he ought, in all such cases, to recover interest, in addition to the debt, by way of damages." (Bronson, J., in Van Rensselaer *v.* Jewett, 2 N. Y. (2 Comst.), 140.)

In a later New York case, the court say, per Davies, C. J.:

"The principle which governs the allowance of interest was clearly enunciated in Van Rensselaer *v.* Jewett (2 Comst., 135), that whenever a debtor is in default for not paying money in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and just indemnity, though it may sometimes be more, never can be less, than the specified amount of money, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought in all such cases to recover interest, in addition to the debt, by way of damages."

And Judge Bronson, in the opinion of the court, says:

"But the courts in this and other States have for many years been tending to the conclusion which we have finally reached, that a man who breaks his contract to pay a debt shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damage which was sustained by the breach. The rule is just in itself, and we think the question should be regarded as settled."

Interest is generally payable from the time the principal ought to be paid. (Adams *v.* Fort Plain Bank, 36 N. Y., 261, citing Farquhar *v.* Morris, 7 Term., 120; Purdy *v.* Phillips, 1 Kern., 406; Dana *v.* Fiedler, 2 Kern. 40.)

(See also Youmans *v.* Heartt, 34 Michigan, 401.)

"It is well settled in this State that if the contract is silent on the subject of interest, and does not by implication exclude it, on money due and payable under the contract, the law implies that interest is to be paid from the time the money becomes payable, and *should have been paid*." (Vt. and Can. R. R. Co. *v.* Vt. Cent. R. R. Co., 34 Vt., 65, middle.)

"It is no answer to an action of this character that a demand has not been made, unless there is something in the agreement under which the money was received, or in the circumstances attending the deposit, implying a right or duty to hold it until actually called for by the owner." (Comstock, J., in Stacy *v.* Graham, 14 N. Y., (4 Kern.) 497.) Upon the next page (498) he says: "The question of interest depends essentially upon the same considerations."

"There is no reason why the State should not be entitled to the same privileges as its citizens, with relation to the right of receiving interest on debts due it." (State *v.* Sullivan, 12 La. Ann., 720. See division VI of this brief.)

IV.

Is there any distinction, in the cause at bar, between the liability of the principal and of the sureties to pay interest on the sum belonging to the United States which Major Holman retained after he ceased to be paymaster?

Let it be premised, that the claim is not, strictly speaking, that interest was promised by the terms of the written instrument executed by the defendants; but that it accrued, by implication of law, upon and as a consequence of the *breach* of their agreement. (Brainard *v.* Jones, 18 N. Y., cited *infra*.)

The contract of these sureties, like all others, is to receive a reasonable interpretation, and to be construed strongly against the party executing it. (Mason *v.* Pritchard, 12 East., 227; Mayer *v.* Isaac, 6 M. & W., 605; Hargreave *v.* Smee, 6 Bing., 249; Wood *v.* Priestner, L. R., 2 Ex., 66; N. H. Co. Bk. *v.* Mitchell, 15 Ct., 206; Lewis *v.* Dwight, 10 Ct., 95; State *v.* Sullivan, 12 La. Ann., 720.)

No distinction can be made, as to the liability for principal or interest, between the present parties and Major Holman. As said in the case previously cited (16 Vermont, 662), he "had engaged to do certain things, and for not doing them he was liable. The sureties engaged that he should do them, and for his not doing them *they* became liable. So that *the same act or neglect that charges the principal must charge the sureties.*" (Seaver *v.* Young, 16 Vt., 662.) "As between them and the United States they were *all principal debtors*, jointly and severally liable as such by the general principles of law, as well as in equity." (United States *v.* Cushman, 2 Sumner, 436, top, per Story, J.)

To the same effect is Berg *v.* Radcliff (6 Johns. Ch., 302). Kent, Ch., there says: "The surety, by joining in the bond, becomes a *principal debtor* to the obligor, and the debt is presumed to have been created upon the credit given to the surety as well as to the principal debtor." (6 Johns. Ch., 306.)

"The bond being joint and several, either all or only one should have been sued on it. The administrator had never been sued on the bond before. *He was not liable to suit on it sooner, or for any other cause, or to* ANY GREATER EXTENT, *than the securities were.* They are responsible on their bond whenever he is; and when

he is not, they are not; and, consequently, when they are not, he is not." (Robertson, J., in Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.), 178.)

"If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and *to the same extent* as the other, although as between themselves they stand as principal and surety. In respect to the creditor, they are joint debtors, fixed with the same obligation; and what discharges one discharges the other—*and nothing less.*" (Shaw *v.* McFarlane, 1 Iredell's Law, 218, per Ruffin, C. J.)

What was the nature and legal effect of this contract into which all the parties entered together with the United States?

Its first general stipulation was that Major Holman should *well* and *truly* and *faithfully* discharge his duties as paymaster according to law, as well as account regularly and refund all moneys unaccounted for. "Unaccounted for," in this connection, must mean "not disbursed according to law."

This general provision covered the performance of *all* his duties as paymaster, without regard to the succeeding clauses.

It required "not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully, if they are violated from want of capacity, or want of care, they can never be said to be well and truly executed." (Minor *v.* Mechanics' Bank, 1 Peters, 69.)

"A man who accepts an office or trust of any kind contracts that he will exercise it with *competent* skill and ability; and his sureties, who are bound that he will ex-

ecute it according to his ability, warrant for the performance of this contract of the officer." (Barrington *v.* Bk of Washington, 14 S. and R., 420, bottom.) The bond in that case was that the cashier should perform his duties "to the best of his abilities."

This case is quoted from and indorsed in Rochester City Bk. *v.* Elwood. (21 N. Y., 94.)

"The bond stipulated for the faithful performance of the duty of the secretary. This was an undertaking for fidelity and honesty commensurate with the scope of his duties; and the enumeration of certain things by him to be performed by the by-law No. 4 did not supersede this obligation, which pervaded every department of his official functions. It was an engagement that he would not avail himself of his position to misapply or embezzle any of the funds of the company, or resort to any unlawful or dishonest device, inconsistent with the due and proper performance of his trust. The company had the right, under such stipulation, to insist upon indemnity for any deviation from the line of his duty to their prejudice, unless there was some provision in the bond to the contrary. Such is the necessary import of the terms of the contract, and the appellant, his security in executing the bond, must be held as stipulating to that effect. Whilst it is an undoubted proposition that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the bond constituting the contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other." (Engler *v.* People's Fire Ins. Co., 46 Md., 333.)

Indicating the distinction noted at the commencement

of this division of our brief (*ante*, p. —), Comstock, J., said: "Whether a surety, at the time of his default, can be held beyond the penalty of his bond, is a question on the interpretation and effect of his contract. Whether interest can be computed after his default, where the effect will be thus to increase his liability, is a question of *compensation for the breach of his contract.*" * * * "Returning to the distinction already mentioned, interest may be due, first, by contract, express or implied, from a course of dealings and the relations of parties; second, *the law may exact it from a party who is in the wrong by withholding money or value due from him to another.* In the latter case, it is allowed as the just measure of damage for the violation of duty or contract; and *sureties can claim no exemption from the rule.*" (Brainard *v.* Jones, 18 N. Y., 36, 37, where it was held that the damages might exceed the penalty; as it was in Harris *v.* Clap, 1 Mass., 308.)

Major Holman's presentation of an incorrect account, including an item for $2,658 lost by his carelessness, which he knew he had no right to insert, and which could not have crept in by mistake, was of itself a breach of this bond. It was a breach as well with regard to the sureties as to the principal. This act affected them all with precisely the same liabilities for that breach.

The unexpended balance of the public funds intrusted to him as paymaster became, upon his retirement, a debt due the United States, which it was his sureties' then-present duty to pay to the obligor, as the measure of their joint liability. (Odlin *v.* Greenleaf, 3 N. H., 271, and cases cited.) So long as they failed to perform that duty, and withheld moneys they should have paid, interest ran against them all. Youmans *v.* Heartt, 34 Mich., 401, and cases above cited.

V.

No demand upon Holman or his sureties was necessary before bringing suit; and, as said in the New York case (Stacy *v.* Graham, 14 N. Y., 497), the recovery of interest depends upon the same principle.

After default, that objection cannot arrest judgment; nor ought it to be considered to qualify the judgment, if it could, at any prior stage of the proceedings, have that effect; it cannot, under existing circumstances.

Holman's insertion of illegal and incorrect items in the account presented superseded the necessity for a demand, if any such were ordinarily required, which can hardly be supposed as to officers intrusted with public funds retiring from their position. Their resignation is equivalent to a demand, both upon them and their sureties, for the moneys actually in the hands of the principals.

"A man cannot claim the privileges and rights of a character which he refuses to sustain, and the responsibilities of which he repudiates. When a tenant disclaims that relationship, and, assuming a belligerent attitude to his landlord, claims to hold in his own right, he is not entitled to notice to quit. In this case the defendant was claiming the money in his own right, insisting that he so received it. He utterly declined being considered the plaintiff's agent, and therefore had no right to insist on the privileges of an agent. The court, therefore, correctly charged the jury that if the defendant received the money as the agent of the plaintiff, their verdict must be against the defendant, even without any demand of payment before suit." (Tillotson *v.* McCrillis, 11 Vermont, 480, middle.)

"Neither law nor reason requires that before he can be sued for his nonfeasance he should be requested to do what his conduct sufficiently indicates his determination not to do." (Bedell *v.* Janney, 4 Gilman (Ill.), 201, bottom.)

The first head-note to Hawley *v.* Sage (15 Conn., 52) sufficiently indicates the drift of the opinion. "When money is received by one man which belongs to another, the law generally raises a promise on the part of the receiver that he will pay it, and that, too, without any previous request." (15 Ct., 52, 54–56.)

In Trustees *v.* Lawrence (11 Paige, 84, middle), the making of a false entry was held to require statutory interest to run from that time, instead of the lower rate previously agreed upon.

In Farmington *v.* Stanley (60 Maine, 476), it was computed from the day an erroneous account was presented, though the demand upon the sureties (if ever made at all, which does not appear) must have been long subsequent to that day, as the error was not discovered until after the death of the principal.

VI.

The right of the United States is precisely that of every bond creditor from whom money is wrongfully withheld. When the government becomes party to a contract its relations to the other parties is the same as those subsisting between individuals. (United States *v.* Barker, 12 Wheaton, 559; United States Bank *v.* Planters' Bank, 9 Wheaton, 904; United States *v.* Ames, 1 Wood. & M., 76; United States *v.* Bank of Metrop., 15 Peters, 377; The Floyd Acceptances, 7 Wallace, 678,

et seq.; Gilbert *v.* United States, 8 Wall., 361–362; United States *v.* Un. Pac. R. R. Co., 98 U. S., 569.)

In cases already cited the precise question of the liability of sureties to the State for interest is determined.

In Farmington *v.* Stanley (60 Maine, 476), the sureties were held for interest from the day their principal presented an inaccurate account of the public funds in his hands.

In State *v.* Sullivan (12 La. Ann., 720), the court said: "There is no reason why the State should not be entitled to the same privileges as its citizens, with relation to the right of receiving interest on debts due it." * * * * * "As then the bail bond, when forfeited, is a debt due the State, it bears legal interest from the day of its forfeiture, for then it became due. This does not render the surety responsible beyond the amount of his obligation; for when he signed the bond he is supposed to have been aware that he was contracting not only to pay the amount of the bond, in the event of its forfeiture, but also legal interest from the time the judgment of forfeiture rendered it a debt due the State." (12 La. Ann., 720.)

AS TO THE SURETIES' ASSIGNMENTS OF ERROR.

1. The preceding argument and citations are sufficient to show that, had Holman been living, no demand would have been necessary as to him, or his sureties. Certainly the latter could hardly have been exonerated had he run away, and so avoided a demand. Neither are they released because he died before the erroneous nature of the account he furnished was discovered. His conduct was (or was the legal equivalent of) a fraudulent evasion of a demand. (Farmington *v.* Stanley, 60 Maine, 476.)

The sureties had both notice of his delinquency and a demand of payment when the writ was served upon them. Yet with that demand they have hitherto refused to comply. They cannot escape forever because Holman died unnotified of his own misconduct.

2. Their default precludes them for now assigning the want of demand, upon either themselves or Holman, for error. The default confessed the cause of action and left only the amount of damages to be ascertained.

Had a demand been necessary it would only have been as matter of proof, not as part of the pleadings.

But if "thereunto required," in the bond, means "upon formal demand," it must have the same meaning in the declaration (Record, 4, top) and is a sufficient averment of a demand—confessed by the default; and so it cannot now be denied.

"An equitable adjustment of all claims secured by the bond" would hardly seem to relieve the obligors from all payments, except a nominal one, because of the want of such an averment.

3. That this may order a *venire facias* for any error in the previous *trial* of a cause is undeniable.

The proper course to be pursued in the present instance was dependent upon the reason for reversal, viz, the death of Hall, "for which cause" the case was remanded "for such further proceedings as justice and law may require, without prejudice to the rights of either party." (Record, 14, top.) That was our stipulation (*Ib.*), especially referred to in your mandate (Record, 11, bottom), which concluded with an order remanding the cause to the circuit court, "for such further proceedings as justice and law may require, without prejudice to the right of either party" (*Ib.*), thus adopting the language of the stipulation, which was the basis of your action in the premises.

4. What proceedings did "law and justice" require in this case, after the former judgment had been reversed, solely for the cause specified, and the death of Hall had been suggested below? (Record, 12, folio 41.) Whether or not the court was authorized to permit the plaintiffs to discontinue as to the deceased defendant Hall, is to be determined by the then existing law in Massachusetts, and not by any decisions found in Lord Raymond or Hobart's Reports, or those of other States, in earlier times, and under different statutes—if these decisions applied to the question, which an examination of them will show not to be the case.

The prior judgment was reversed as to *all* the original defendants. Then the district attorney discontinued as to one, deceased. *The default of the others remained. They did not ask to have it removed.* Indeed, they did not ask

anything, but did "object to the order for judgment and to the order for interest." (Record, 13, top.) *They filed no exceptions to the course adopted.* If they had, they would have been untenable. *They* could not have been considered aggrieved, under the Massachusetts statutes below printed (which are "rules of decision" in the circuit court there sitting), even if a living surety's name were struck out of the action; certainly they could not be by a discontinuance as to a deceased party.

The sections of the general statutes of Massachusetts applicable to this branch of our case are as follows:

"SEC. 41. *At any time before final judgment* in a civil suit amendments may be allowed, on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, *discontinuing as to any joint* plaintiff or defendant, changing the form of the action, and in any other matter, either of form or *substance*, in any process, pleading, or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or the defendant to make a legal defense.

"SEC. 42. *After judgment* in any civil action, defects or imperfections in matter of form found in the record or proceedings may be rectified and amended by the court in which the judgment is rendered, or by the court to which it is removed by writ of error, if substantial justice requires it, and if the amendment is in affirmance of the judgment.

"SEC. 43. If a defendant being duly served with process fails to appear, his default shall be recorded, the charge in the declaration shall be taken to be true, and judgment rendered accordingly.

"SEC. 44. If, after such default *at the first term*, the

defendant appears before the jury is dismissed, the court may take off the default and allow the appearance to be entered, upon the defendant's paying the plaintiff's costs up to that time, or such part thereof as the court shall think reasonable." (General Stats. of Mass., A. D. 1860, page 658.)

As to Curtis and Foster, their default admitted the charge in the declaration to be true.

Upon that default, Revised Statutes of the United States, section 961, prescribed the duty of the district attorney thus:

"In all suits brought to recover the forfeiture annexed to any article of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain it shall, if either of the parties request it, be assessed by a jury."

Acting in obedience to these provisions of Federal and State laws, it is difficult to perceive how any other course than the one adopted could well have been pursued. At any rate, it was the one required by law and justice and prejudiced no right of either party; since the right so to amend is secured by statute and liberally granted by the courts of Massachusetts. (Rehoboth *v.* Hunt, 1 Pick., 224; Goddard *v.* Pratt, 16 Pick., 412; Winsor *v.* Lombard, 18 Pick., 57; Dodge *v.* Wilkinson, 3 Metc., 292; Thayer *v.* Hollis, *Id.*, 369; Finney *v.* Bedford Ins. Co., 8 Metc., 348; Cleaves *v.* Lord, 3 Gray, 66.)

In Turner *v.* Bissel (14 Pick., 192), the plaintiff discontinued as to one defendant after default. It could

little concern the co-defendants, who had admitted their own liablity, whether the discontinuance discharged an original promisor, still living, or the representative of one deceased; or merely struck out the name of a dead man, not served nor represented.

It might be questionable whether or not Foster and Curtis could have availed themselves of Hall's death to abate the writ (Bonzey *v.* Redman, 40 Maine, 336); but if they could, they certainly should have pleaded specially this matter, arising dehors the record, in abatement; and the issue would have been raised whether or not, under R. S., sec. 954, it should have abated for that cause.

If the circuit court had ruled against any plea in abatement pleaded upon this ground, this court could not have reversed it. (R. S., sec. 1011.) Neither can the defendants in effect plead in abatement for the first time in this court. Whatever rights, if any, this chance mistake, or lack of information, might have originally conferred upon them to temporarily defeat or delay the action, these are now lost and waived by the course they elected to pursue.

EDWIN B. SMITH,
Assistant Attorney-General.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

No. 706.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

JAMES O. CURTIS AND JOSHUA T. FOSTER.

No. 707.

JAMES O. CURTIS AND JOSHUA T. FOSTER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT, U.S., FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR CURTIS AND FOSTER AS PLAINTIFFS AND DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

THE original action was a suit (p. 3) against these parties, Curtis and Foster, and also one Peter C. Hall, as sureties jointly and severally upon a bond given to the United States, May 30, 1862, by one Oliver Holman, as principal, to secure the faithful discharge of his duties as an additional paymaster in the United-States army; the pertinent condition of this bond being that said Holman should "refund at any time, *when thereunto required*, any public money remaining in his hands *unaccounted for*" (p. 4).

Nov. 30, 1865 (p. 6), Holman went out of office, and on that day rendered a final account, showing nothing due to

the government or to himself; and he deceased in February, 1872 (p. 6).

On March 18, 1872, on final adjustment of Holman's accounts, the sum of $3,320.02 (p. 7) was by the second auditor found to be due to the United States; and a letter showing this result of the audit came into the hands of one of his sons (p. 6).

Oct. 15, 1872 (p. 5), this suit was brought against the above three sureties (but no service was made upon Hall) to recover this balance; and after sundry continuances, in order that the defendants might have time to obtain in the Court of Claims relief from liability, especially for a sum stolen, which relief was refused because the delivery of the package to an orderly by whom it was stolen was deemed to be a fault or neglect, they were, at the May term in 1876, defaulted (p. 6).

No previous demand for this sum had been made upon Holman or his legal representative, or upon these sureties (p. 6).

Upon a subsequent hearing (R. S. sect. 961) to ascertain the amount equitably due from these sureties, Mr. Justice Clifford ruled, that, no demand having been made upon Holman or his representative for the sum due previous to the service of the writ, no interest should be allowed to the government for any earlier time; and, accordingly, judgment was entered against the three defendants for the sum reported due ($3,320.02), and interest thereon from Oct. 15, 1872 (pp. 7, 8).

Thereupon the government sued out a writ of error; and later the defendants, Curtis and Foster, also.

Whatever other questions might be open under these writs of error, the counsel on both sides soon came to understand that their consideration might be complicated by the presence of another fact, which had been somewhat overlooked; namely, that said Peter C. Hall had deceased before the date of the writ in which his name appears as one of the defendants. He had never, as the officer's return shows, been served with process; had never been in court as a party in this suit.

It was thereupon, at the October term, 1877, of this court,

agreed (the stipulation is made a part of this case, pp. 13, 14) that an order should be made that the judgment in this case should "be reversed, and the case remanded to the Circuit Court for such further proceedings as justice and law may require, without prejudice to the rights of either party."

Accordingly the case was returned to the Circuit Court, — it happened, — without the stipulation in accordance with which this court took its action, merely upon a mandate which did not show what error this court had found in the proceedings.

Thereupon the Circuit Court, having ordered the previous judgment reversed, allowed the attorney for the United States to suggest the death of the defendant Hall, and striking his name from the writ, as though he had died after service upon him, as a party duly in court, proceeded to render a new judgment against the remaining defendants, Curtis and Foster, as before; the attorney for the government claiming that interest ought to be allowed upon the principal sum from Nov. 30, 1865; and the attorney for the defendants objecting to any judgment for the plaintiffs (p. 13), and urging the court to hear and consider objections which he had to make to the proposed judgment, other than that arising from the death aforesaid of Hall, which objections the court refused to hear, as these objections had not been presented to the Court of Errors.

Again the government sued out a writ of error; and thereafter the defendants likewise.

POINTS OF LAW FOR CURTIS ET AL. AS DEFENDANTS IN ERROR.

SPECIFICATION.

In the disallowance of interest before the date of the writ, there was no error.

I. It is of little avail to suggest against this point that the principal sum in this case is found to have been due from the paymaster Holman on Nov. 30, 1865. Money does not

always bear interest when due. It is a much more relative fact that it has become payable.

II. But in the present case the liability of Holman is not to the point. The sureties are the defendants in this case, and their liability may be quite different from that of Holman, — different both at common law and under the statutes of the United States regulating the duties of paymasters.

III. These sureties are liable only by virtue of their contract; and theirs is a contract which is not to be enlarged by implication, but to be kept within the strict limits of its terms.

Bank of Brighton *v.* Smith, 12 Allen (Mass.), 243 (251).

IV. The obligation of their contract was that their principal, Holman, should refund public money remaining in his hands *unaccounted for, when required;* and the case finds no such requirement to have been made on Nov. 30, 1865.

V. By a preceding provision, they had bound themselves that Holman should, for all moneys officially received by him, "regularly account."

This Holman did: he rendered his final account when he left his office.

VI. This account came down to the close of his service, covering all his receipts. It showed nothing due from or to the government, no money in his hands unaccounted for.

VII. His next duty is, if this account shall be found incorrect, to make it good; to correct by payment, if need be, any errors which shall be found in it: in other words, to refund, *when required*, any money which a revision of his accounts shall show in his hands "*unaccounted for.*" That is, he is to respond to the demand of the accounting officers for any balance found due from him upon the adjustment of his account. Until this adjustment in correction of Holman's final account, no public moneys remained in his hands "*unaccounted for.*"

This construction is alike required by the terms of the defendants' obligation, and by those of the Statute of March 3, 1797. Stat. at L., vol i. p. 512.

U. S. *v.* Collier, 3 Blatchford, 325.

It is corroborated by a decision of this court, at its last term but one, in a kindred case, that of C. C. Clark *v.* the United States.

96 U. S. 37.

VIII. The case finds that the sum now claimed as due from Holman was never demanded of him during his life-time, nor of his representative after his decease. It is explicit to the effect that neither Holman nor his representative was ever required to refund this sum prior to the service of the writ in this case (p. 6, last sentence).

Consequently interest upon that sum ought not to be allowed earlier than that date.

IX. If it should seem necessary, it may be shown that the Statute of 1797 applies only to receiving-officers, not to disbursing-officers.

Certainly it applies only to officers, and not to sureties on official bonds.

POINTS OF LAW FOR CURTIS ET AL. AS PLAINTIFFS IN ERROR.

SPECIFICATION I.

The court erred in awarding any sum whatever, or any sum other than one merely nominal as damages.

X. For the writ did not make the requisite demand upon Holman or his personal representative. It ran against, was served upon, neither.

The case, then, finds no breach of the defendants' bond.

XI. For the purpose of ascertaining the sum due in equity

and good conscience, the default of the defendants does not cure this defect in the proof, as "no defect or admission in the previous pleadings can deprive either party of the right to an equitable adjustment of all claims secured by the bond."

Merrill *v.* MacIntire, 13 Gray, 157.
Attleborough *v.* Hatch, 97 Mass. 533.

XII. If, then, the default in this case will serve to justify any judgment for the plaintiffs, it must be a judgment merely for nominal damages.

SPECIFICATION II.

In the absence of directions to award a *venire facias de novo*, and of any direction from this court as to the error which had been found in the previous judgment, it was error in the court below to do any thing beyond a reversal of that judgment, except (it may be in order to dispose of the case) to render judgment for the defendants.

That a direction to award a *venire facias de novo* is still a part of the practice of this court, these very recent cases will show: —

Bird *v.* Bank, 93 U. S. 96.
Ins. Co. *v.* Davis, 95 U. S. 425.
Railroad Co. *v.* Jones, *Ib.* 439.

SPECIFICATION III.

This court may, however, consider this case in the light of all the facts now before it; and in that view these plaintiffs specify as follows: —

It was error in the court below not to vacate all the proceedings as far back as the original writ, which, as made out against a defendant not living, was fatally defective.

Commrs. *v.* Carey, 1 Ohio State, 463.
Cole *v.* Pennell, 2 Rand. 174.

SPECIFICATION IV.

It was error in the court below (having vacated the pro-

ceedings subsequent to the writ) not to abate the writ, or not to give judgment thereon for the defendants.

See Rowan *v.* Woodward, 2 A. K. Marshall (Ken.) 140; Clark *v.* Helms, 1 ~~Revek~~. (Conn.) 486. Also Plummer *v.* Webb, 2 Ld. Raymond, 1415; Wilkes *v.* Jordan, Hob. 5. Root

SPECIFICATION V.

It was error clearly, under the mandate in this case, not to give to the defendants all the privileges of a trial *de novo*.

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